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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

ROOSEVELT STEAMSHIP COMPANY, INC.,

Petitioner,

*against*MARGARET M. BRADY, as Administra-
trix of the Estate of JAMES P.
BRADY, deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION
FOR CERTIORARI.

AS A MATTER OF LAW, THE CREW WERE NOT SERVANTS OF THE PETITIONER AND, THEREFORE, PETITIONER WAS NOT LIABLE FOR THE DEATH.

The facts and the proceedings below have already been stated in the petition and will not be repeated here.

An agent is liable for his tort. An agent is also liable for the tort of his servants insofar as such torts are within the scope of the employment.

We emphasize these statements by making them at the beginning of this brief because we wish to meet and dismiss at the outset any suggestion that the petitioner is contending for any contrary proposition. The question here is whether the tort was petitioner's tort. Since petitioner is a corporation, it was not petitioner's tort unless it was committed by some person who was a servant of

petitioner. There was no evidence that the petitioner or any of its shore servants was negligent. The evidence led to the inference that the only persons negligent were the crew of the *S.S. Unicoi*. The ultimate question, therefore, is, whose servants were the crew?

If, *as a matter of law*, the crew were petitioner's servants, the judgment should be affirmed. If, *as a matter of law*, the United States employed the crew, the judgment should be reversed. If employment of the crew is a *question of fact*, the judgment should be reversed. There was testimony that petitioner did not employ the crew. This was erroneously disregarded when both Courts below ruled that *as a matter of law* petitioner was the employer.

The true relation of the agent to the United States and to third parties is strikingly illustrated by the case of *New York & Cuba Mail Steamship Company v. United States* (opinion of Judge Hough, 12 F. (2d) 348, 1926; cert. den. 273 U. S. 719). In that case, the agent under a similar agreement was held liable for the tort of a servant but it was the tort of the agent's own shore servant which gave rise to the liability. At the same time, the court recognized that an entirely different question would have been before it for decision had the tort been committed by a member of the crew. The court said, at page 349:

"It has not been claimed by the United States, and is vehemently denied by the Steamship Company, that this agency agreement makes it responsible for the careless navigation of navigators by it selected, *and it is indeed a serious matter to hold responsible for the navigation of a vessel the agent who procured the navigators*. We are not required, and therefore not permitted, to consider the larger possible aspect of the matter. We do not now hold that by virtue of the agency agreement Steamship Company became responsible for the navigation of the *Suwied*.

But there can be no doubt that the chief stevedore on Pier 15 was a subagent, and therefore by the explicit terms of the contract his acts are to be considered the agent's acts." (Italics ours.)

In conformity with the distinction observed in the above case, petitioner admits that, if the death in this case had been caused by the negligence of any of its own servants, it would be liable. However, because the death was caused by the negligence of members of the crew *who were not servants of the petitioner*, petitioner is not liable.

Since the crew were not servants of petitioner, it follows that they were servants of the United States. It follows from this that the United States was liable for the death insofar as the United States has consented to be liable for the negligence of its servants. However, petitioner does not assert that it is not liable for the death because the United States is liable for the death. Rather, petitioner asserts that it is not liable for the death because the persons who caused it were not its servants.

As noted by the Circuit Court in its opinion in the *Quinn* case, the liability of one person for a tort is not, necessarily, exclusive of the liability of another person for the same tort. Nevertheless, in the absence of a joint employment, employment by the United States excludes employment by petitioner, and vice versa.

Therefore the suggestion in the *Quinn* case that a tort claimant may have "a two-stringed bow" is beside the point. Obviously, where the liability depends on the existence of a master and servant relationship, and on that only, there cannot be a "two-stringed bow" unless there are two masters. If, by hypothesis, there is only one, the only question is: which is that one.

Insofar as petitioner maintained a shore organization employing persons to do the work which the petitioner had

undertaken to do for the United States, it was an employer of labor and the persons so employed were its servants. However, the crew were not hired to perform defendant's obligations. They were hired to navigate the vessels, by, for, and on behalf of the United States, which was the operator. Any services rendered by the petitioner to the United States in connection with the hiring, supervision or control of such members of the crew was no more than that exercised by a superior servant, such as a captain of a ship or a general manager of a factory. Such persons hire, supervise and *control* servants, but they are not their masters. The master and servant relationship does not exist between the superior and the inferior servant even though the superior servant *controls* the inferior and even though that control can be and is, frequently, exercised directly and physically.

For the same reasons, it did not exist below so far as the petitioner and the members of the crew were concerned.

The foregoing is supported by the following authorities:

- Restatement of the Law of Agency, Sections 1, 2, 5, 219, 220, comment on sub-sections (1): (a and c) 222, 250, 251, 255, 358, 361, 362;
- Robert v. United States Shipping Board Emergency Fleet Corporation*, 240 N. Y. 474 (1925) (opinion by Cardozo, J.);
- Folwell v. Miller*, 145 Fed. 495 (1906), Second Circuit;
- Wahlheimer v. Hardenbergh*, 217 N. Y. 264 (1916) (opinion by Cardozo, J.);
- Smith v. Rutledge*, 332 Ill. 150 (1928);
- Bath v. Caton*, 37 Mich. 199, 202 (1877);
- Ellis v. Southern Railway Co. and P. I. Welles*, 72 S. C. 465 (1905);
- Johnson v. City of Memphis*, 77 Tenn. 125 (1882);

Brown v. Lent, 20 Vt. 529 (1848);
Parker, et ux. v. Cone, et al., 104 Vt. 421 (1932);
City of Los Angeles v. Los Angeles Pacific Navigation Co., et al. (1927), A. M. C. 1778, 84 Cal. App. 413 (1927).

In Restatement of the Law of Agency, section 220, comment on sub-section (1) a, it is said:

“The word ‘servant’ does not exclusively connote a person rendering manual labor, but one who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service. The word indicates the closeness of the relationship between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it. Thus, ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them.”

In section 358, comment on sub-section (1) a, the following is said:

“The doctrine of respondeat superior does not apply to create liability against an agent, even though other agents are subject to his orders in the execution of the principal’s affairs. He is, however, subject to liability under the rules stated in Sections 344, 351, 356, if he directs or permits tortious conduct by them or fails properly to exercise control over them.

“Illustration:

1. A is employed by P as general manager. B, a servant *under the immediate direction of A*, is

negligent in the management of a machine, thereby injuring T, a business visitor. A is not liable to T." (Italics ours.)

In *City of Los Angeles v. Los Angeles Pacific Navigation Co., et al., supra*, the court had before it for decision the precise point of the relation between a managing agent of the United States and members of crews of United States owned vessels. The defendant was a private corporation acting as a managing agent for the United States of America under a contract known as the M. O. 3 contract, which was in all material respects the same as a contract between the United States of America and Roosevelt Steamship Company, Inc. in this case. A merchant vessel owned by the United States had been assigned to the defendant to "operate" pursuant to the terms of the contract and had come into collision with a ferry boat belonging to the plaintiff. It was claimed that the defendant was liable, on the ground that the captain of the vessel, who was negligent, and had caused the collision, was the servant of the managing agent.

The court examined the contract, reviewed the authorities and, in a well-considered opinion, held that the captain was not the servant of the managing agent, and that the managing agent, accordingly, was not liable.

That case was cited in the briefs in the *Quinn* case, but was not mentioned in the opinion.

In support of its decision in *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190, the Circuit Court for the Second Circuit cited only one case, viz., *United States Shipping Board Emergency Fleet Corporation v. Greenwald*, 16 F. (2d) 948 (1927).

That case, however, was not in point. The *Greenwald* case proceeded upon the theory that the managing agent in

that case was the owner *pro hac vice*. That was because both the Fleet Corporation and A. H. Bull & Co., the managing agent, were sued jointly and because the defense, which was conducted jointly, made no contest of the point as to which one of them employed the crew. The Fleet Corporation, admittedly, was the owner *pro hac vice* and, when plaintiff's counsel represented to the court that the managing agent "operated" the vessels on a percentage basis and that the Fleet Corporation merely maintained "a sort of check on the officers and vessels", the attorney for both defendants did not contest either the statement or the implication. See Transcript of Record in *Greenwald* case, p. 51. There was no reason to do so, because, at all events, the actual employer was before the court in the person of *one* of the defendants. Thus, the Circuit Court in the *Greenwald* case was led to regard the managing agent as a partner of the Fleet Corporation and, therefore, like the Fleet Corporation, an owner *pro hac vice*. However, it is a far different matter to hold that a managing agent who is sued separately and who denies that he employed the crew is, nevertheless, a *pro hac vice* owner. A *pro hac vice* owner is an entrepreneur. An agent may act for an entrepreneur, but he is not one.

A holding that an agency contract such as the one involved herein is a bare boat or demise charter cannot be justified. See Robinson on Admiralty, page 594, and cases cited in the notes. 46 U. S. C. section 186.

It is true that the existence of a master and servant relationship is not to be determined by reference to a single circumstance, such as the source of the money which is used to pay wages. The existence of the relationship depends on other circumstances as well. A number of those circumstances are set forth in Restatement of the Law of Agency,

Vol. 1, Sec. 220. Applying those tests to the agency contract involved herein, it should be held, *without more*, that *as a matter of law* the crew were the servants of the United States and were not the servants of the petitioner. But, when there is added to the evidence provided by the contract the circumstance that the uncontradicted testimony in this case was that petitioner did *not* employ the crew and that the United States *did*, it would seem that such a holding as a matter of law is inescapable.

After all, this Court in *Standard Oil Co. v. Anderson*, 212 U. S. 215, ruled, in an analogous situation, that the existence of the master and servant relationship depended in large measure on whose work was being done.

We submit that the answer in this case lies in an answer to the same question.

THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

RAYMOND PARMER,
VERNON SIMS JONES,
Attorneys for Petitioner.

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MAY 20 1943

CHARLES ELMORE COFFLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

—◆—
No. 1,014.
—◆—

ROOSEVELT STEAMSHIP COMPANY, INC.,
Petitioner,
against

MARGARET M. BRADY, as Administratrix of the
Estate of James P. Brady, deceased,
Respondent.

MEMORANDUM IN OPPOSITION TO PETITION
FOR CERTIORARI.

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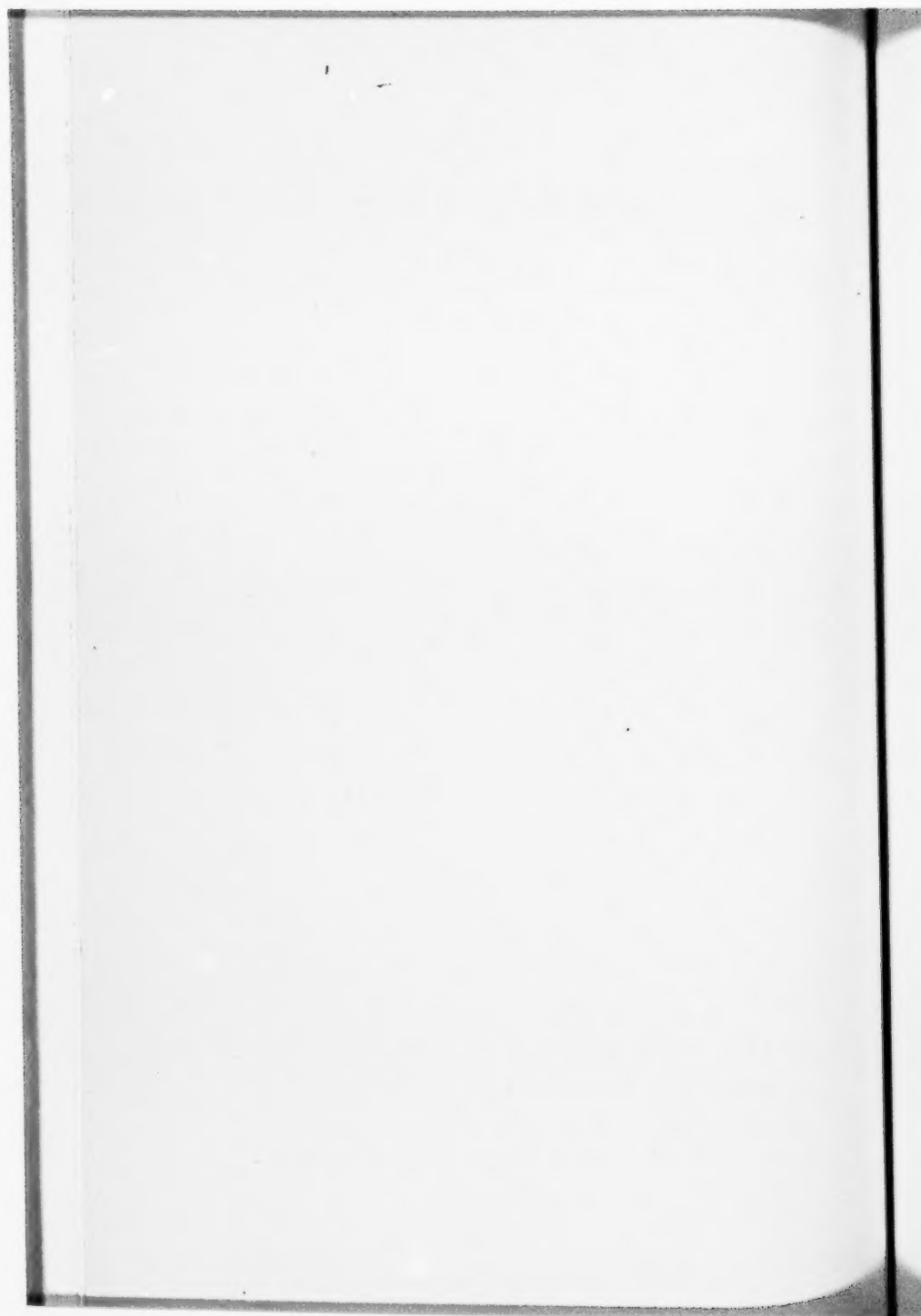


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IN THE
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OCTOBER TERM, 1942.

No. 1,014.

ROOSEVELT STEAMSHIP COMPANY, INC.,
Petitioner,
against

MARGARET M. BRADY, as Administratrix of the
Estate of James P. Brady, deceased,
Respondent.

**MEMORANDUM IN OPPOSITION TO PETITION
FOR CERTIORARI.**

This petition for certiorari, although entitled in the *Brady* case, is, in reality, but a subtle effort to have this court review the decision in *Quinn v. Southgate Nelson*, 121 Fed. (2d) 190, notwithstanding that this court had heretofore denied certiorari in the *Quinn* case.

Southgate Nelson v. Quinn, 314 U. S. 682.

The *Quinn* case held that, under an identical operating agreement as that made with *Roosevelt Steamship Company* in this *Brady* case, the managing agent was directly and personally liable for its own torts, committed through its servants, irrespective of who paid their wages.

The trial judge in this *Brady* case naturally followed the *Quinn* decision. It was an exact precedent.

Statement Of The Case.

Brady, the decedent, was a United States Custom's Inspector and, in the line of duty, he was required to board incoming vessels and to do as soon as the vessel had provided a means for him to get aboard. He intended to inspect the baggage on the steamship "Unicoi". This vessel was operated by the Roosevelt Steamship Company as Managing Operator under a written contract made in 1937 which obligated the Roosevelt Steamship Company to man, equip and supply the vessel and to keep her tackle, furniture, apparel and appliances in repair, and to refrain from doing anything which might cause loss or damage.

As soon as this vessel came alongside her dock and was made fast, the crew put a ship's ladder over the side. Pursuant to custom, Brady started up this ladder in the performance of his duties. The ladder was unsafe and unseaworthy. Certainly one rung was rotten, and while going up the ladder a rotten rung broke and Brady was caused to lose his footing, and he sustained injuries which subsequently proved fatal.

His widow, as administratrix, brought suit to recover damages. During the trial the defendant objected to the exclusion of certain testimony; also objected to the admission of certain testimony, reserving proper exceptions on the record. It also moved at the proper time to dismiss the complaint upon the ground that no legal liability had been established against the defendant. Furthermore, both before and after plaintiff rested, the defendant moved to dismiss the complaint upon the ground that the court was without jurisdiction to entertain it because the exclusive remedy was under the Suits in Admiralty Act. This motion was denied. Exception was duly noted.

The jury brought in a verdict in favor of the plaintiff; motions to set it aside were overruled; the court approved the verdict as to propriety and amount, and judgment was entered.

Although on that trial the Roosevelt Steamship Company had raised questions in respect of the merits and contended that there was an absence of proof that the defendant sued, or any of its servants or employees, had committed the tort, and had also attacked the jurisdiction of the court because it contended the sole remedy was in admiralty under the *Lustgarten* decision (280 U. S. 320), nevertheless, when it appealed to the Circuit Court of Appeals, it elected to abandon all questions in respect of the merits and all exceptions to trial rulings on evidence, and *decided to stand or fall solely on the jurisdictional question*. Strange, but true.

In its brief in the Circuit Court of Appeals the Roosevelt Steamship Company, this petitioner, made the following declaration of abandonment:

“Appellant does not raise any question with respect to the merits. The only point which appellant makes is that, by reason of the provisions of the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742, the District Court, sitting at common law, was without jurisdiction to determine the liability, if any, between the parties.”

And pursuant to that express waiver it proceeded to argue but one point, i. e., the jurisdictional question.

The Circuit Court of Appeals, under the *Lustgarten* decision, reversed the judgment and dismissed the complaint because it held that the exclusive remedy was under the Suits in Admiralty Act.

Roosevelt S. S. Co. v. Brady, 128 F. (2d) 169.

No question as to the sufficiency of proof of negligence or as to who employed the crew, or whose servant the crew happened to be, was decided because none of those questions was before the court.

First Certiorari.

After that decision Mrs. Brady petitioned this court to grant certiorari to review the Circuit Court of Appeals' decision *on the jurisdictional question*. Simply that and nothing more.

However, the Roosevelt Steamship Company, in its briefs, injected questions affecting the merits, notwithstanding it had expressly waived and abandoned all such questions, and notwithstanding none had been presented to, or was passed upon, by the Circuit Court of Appeals.

This court granted certiorari and reversed the Circuit Court of Appeals, holding that the agent could be sued at common law.

Brady v. Roosevelt S. S. Co., 317 U. S. 575; 63 S. Ct. 425.

The discussion in its briefs by Roosevelt Steamship Company of the alleged trial errors affecting the merits, evidently created the impression on this court that those questions as to the merits *had been raised before the Circuit Court of Appeals*, hence, in reversing on the jurisdictional question, this court, evidently believing that the question of merits (legal liability) had been properly brought before the Circuit Court of Appeals, but not decided by that court, said this in the concluding paragraph of its *Brady* opinion:

"We hold that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort. Whether a cause of action against respondent has been established is, of course, a different question as the issues involved in *Quinn v. Southgate Nelson Corp.*, *supra*, indicate. *The Circuit Court of Appeals did not reach that question*. Accordingly we reverse the judgment and remand the cause to it." (Italics supplied.)

Certainly the Circuit Court of Appeals did not reach "that question", namely, whether a legal cause of action against defendant had been established, and for the very good and sufficient reason that "that question" had been abandoned by defendant, and had not been presented to the Circuit Court of Appeals.

The appellant conceded that a cause of action had been established, but sought to escape the judgment by contending that the court was without jurisdiction and, therefore, *for that reason*, the judgment was void.

Before the mandate of this court was filed in the Circuit Court of Appeals, the Roosevelt Steamship Company petitioned this court for a rehearing, seeking thereby a clarification of the above quoted direction to the Circuit Court of Appeals. This request was refused.

Motion For Judgment On Mandate.

After the mandate was filed, and in order to present an opportunity to the Circuit Court of Appeals to interpret the direction from this court in the light of the express abandonment by Roosevelt Steamship Company of all questions as to the merits, Mrs. Brady moved that court to affirm the judgment. The Roosevelt Steamship Company opposed that motion.

The Circuit Court of Appeals agreed that there had been an abandonment of all questions affecting the merits and consequently, since the law court had jurisdiction, and no other error had been assigned, the judgment must be affirmed.

With that announcement made, the attorney for Roosevelt Steamship Company (Mr. Parmer) requested the court to predicate its ruling on its adherence to its *Quinn* decision. The court so agreed for it still considered that the *Quinn* case had been rightly decided.

Manifestly that ruling was sought in anticipation of this petition to indirectly have this court review the *Quinn* decision, although it had previously denied a certiorari.

The Petition.

The petitioner under "Questions Presented" lists three propositions (p. 9), to wit,

a. What is the status, as respects the employment of the crew of a government-owned vessel, of a corporation acting under the operating agreement in this particular case, or when acting under the new agreement?

b. Is such status a legal question for judicial statement, or is it a factual one for decision by different juries in various jurisdictions?

c. If a legal question, is the agent the sole employer of the crew or is the United States the sole employer?

Grounds For Granting Writ Without Merit.

Why drag in the new agreement? This case is to be determined by the contractual relation of the parties as fixed by the contract under which the vessel was operated at the time the cause of action arose. That was the old agreement of 1937.

The ship-operators and the War Shipping Administration may greatly desire a decision under the new 1942 contract so as to set at rest the questions raised by pending common law actions against the operating agents, but neither this court nor this case can be used as a convenience to obtain a ruling on a contract *not involved in the instant case*.

With so many suits listed by petitioner as pending under the new or modified contract, certainly one of them could soon be prosecuted to this court, and thus regularly obtain the decision so devoutly wished.

Previous Effort Was Abortive.

On the argument of the *Brady* case before this court, copies of the new agreement—manifestly framed to circumvent the *Quinn* decision—were placed before each justice. They were brushed aside as utterly irrelevant, and they are just as irrelevant now.

Questions Now Raised Not In Brady Record.

But what present relevancy has the questions whether the crew status under the contract be for judicial or jury determination, or whether the vessel operator or the vessel owner employed the crew?

Neither question arises on this Brady record. The trial court held that Roosevelt Steamship Company was the responsible agent, liable for the negligence of the crew, as a matter of law. Even if that decision had been erroneous, the error was not only *not urged* but was *expressly abandoned on appeal*.

The question of who selects or who pays the crew is immaterial. Even if the United States had engaged the services of the crew and paid their wages, nevertheless, when Roosevelt Steamship Company took charge and supervision of them as ship's personnel, whose work and activities it directed, they become its servants even though their wages may have been paid by another. They were its workmen, doing its work, and became *pro hac vice* its servants.

Standard Oil v. Anderson, 212 U. S. 215;

Florida Grain v. Shipping Board, 300 Fed. 172;

The Charlotte, 285 Fed. 84;

Metro. S. S. Co. v. Pacific-Alaska Co., 260 Fed. 973;

Noce v. Morgan Co., 106 Fed. (2d) 746 (6).

This identical question was presented in the *Quinn* petition for certiorari. The writ was denied. See *Quinn* brief in opposition to petition.

Proof Of Legal Liability Was Made.

Under the Jones Act (46 U. S. C. A. 688), the relation of master and servant must exist. If Brady had been one of the seamen then the suit must have been against his employer. Who was the employer might then have become important, but it is not important here because Brady was a custom's inspector, and not a member of the crew. His was a third party action and not under the Jones Act.

Brady, as administratrix, sued the agent who was in personal and physical custody and control of the crew, and who was engaged in operating the vessel. That agent, through its servants, placed a ladder for Brady's use which had a rotten rung. This ladder was a part of the ship's appliances and equipment which the agent had agreed to keep in repair.

“The Managing Agent shall, * * * exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering * * * tackle, apparel, furniture, equipment * * * and will effect maintenance and voyage repairs and replacements.”

Operating Agreement, paragraph 11 (R. 26).

The defendant below made no effort at the trial to disprove the substantive facts of negligence.

The defendant had the possession and control of the vessel and of her tools and appliances; the defendant was under contract duty to keep the tools and appliances in a seaworthy condition; the vessel's crew put the vessel's ladder over the side; the ladder was defective because the rung was rotten (R. 70); Brady had a right to use the ladder and while using it he fell; the injuries which he sustained eventuated in his death. Thus a prima facie case was proven.

“Burning brand thrown from engine, presumption man on engine was employee of defendant and right-fully engaged in work on the engine.”

McConn v. New York Central, 66 Barbour (N. Y.) 338.

Men working on telephone lines justifies an inference that they were telephone company's servants.

Kilmer v. N. Y. Tel. Co., 228 App. Div. 63.

The defendant made no attempt at explanation or exculpation, and all inferences remained in favor of plaintiff.

Harvey v. Proctor, 158 App. Div. 139; 143 N. Y. S. 1121.

This court would have no right to review the jury's finding on the facts, when approved by the trial judge, particularly when no question had been raised or argued in appellant's brief. Certainly it would have no right to now consider that question in view of its emphatic abandonment in the court below when appellant declared,

“Appellant does not raise any question with respect to the merits.”

The district court had jurisdiction at common law; the operating agent was legally liable for its own torts; the jury found that it had committed a tort which proximately caused the death of Brady; the trial judge approved the verdict. On appeal the only error alleged was as to jurisdiction at common law. This court held that the court did have jurisdiction.

There was nothing left for decision by the Circuit Court of Appeals and unless this court is inclined to allow the petitioner, by this devious route, to raise questions based

on matters which are not in the record, then a denial of the writ must follow.

On the previous consideration of this case this court had only one legal question presented to it and that was finally decided in Mrs. Brady's favor. At least, we thought it was final.

No Reason For Granting The Writ.

Petitioner sets forth three reasons why the writ of certiorari should be granted. Not one of them presents any basis for granting certiorari. They are re-stated and answered as follows:

1.

The decision of the Circuit Court of Appeals (in *adhering to its prior decision in the Quinn case*) is said to be in conflict with a state court decision in California and an early decision of the Circuit Court of Appeals, Second Circuit.

The California decision involved the old M. O. 3 form under the Fleet Corporation set up, and this court decided to the contrary in the Sloan's Shipyard case, 258 U. S. 549.

So that "precedent" is out.

The early federal case, *N. Y. & Cuba Mail v. U. S.*, 12 Fed. (2d) 348, merely decided that a "tortfeasor cannot recover from his principal his own loss caused by a tort he himself committed".

In that case the steamship company was the government's agent. The agent's own employee, the dock stevedore, by a negligent order, caused damage to the steamship company's property. The steamship company sought to recover from its principal (the United States) for the damage to its property which its own agent had caused. Recovery was necessarily denied. Those facts have no application to this *Brady* case.

There is no conflict between either decision and *Quinn v. Southgate Nelson*, 121 Fed. (2d) 190 which followed a long line of decisions by this court, starting with the Sloan's Shipyard case, holding that an agent was liable for its own torts.

It is now too late to revive the alleged but abandoned error of the trial court in following the *Quinn* decision.

2.

It is claimed that the Circuit Court of Appeals has decided an important question of local law probably in conflict with other local decisions.

This position assumes that Roosevelt Steamship Company was a mere intermediate servant or a menial, subordinate agent. This same position was taken by Southgate Nelson Company in its petition for certiorari in the *Quinn* case, and it cited the same old decisions as now appear in petitioner's brief.

The Roosevelt Steamship Company was a responsible, operating agent upon whom was imposed important work involving far-reaching and controlling decisions in operating a large fleet of steamships. Under no stretch of imagination could this high contracting party be considered an inferior agent, a mere sub-agent, a subordinate agent or an intermediate agent. On the contrary, it was an executive, managerial, primary agent which had assumed grave responsibilities involving the possession and operation of a fleet worth millions. It was called the Managing Operator. It had contracted to manage and operate. It was directly liable for its own negligence.

3.

The Quinn case, and the adherence to it by the Circuit Court of Appeals in this Brady case, has led to confusion and uncertainty respecting operating agents of United States merchant vessels.

If any uncertainty now exists it arose *subsequent to the trial of the Brady case*, and because of the new form of operating agreement now used.

This court, in an unbroken line of decisions, had held that agents may be held personally and directly liable for their own negligence.

The *Quinn* case, interpreting the managing agreement made under the mandate of the Merchant Marine Act of 1936 (46 U. S. C. A., Sec. 1194) followed those decisions. This court denied certiorari.

Petition Is Without Merit.

Thereafter, in an effort to nullify the *Quinn* case, the government formulated a new contract with its operating agents.

The liability of the agent for its own tort under that new contract has not been decided. Many cases are pending. Undoubtedly a decision is desirable, but that new contract *was not even in existence when Brady was killed*; it was not in existence when the case was tried. It was not in the record on appeal, and consequently is not now in the *Brady* record. The steamship "Unicoi" was not operated under it when Brady was killed.

This petitioner wants to inject this new contract into *this* case. This was attempted when this case was argued before this court last December when copies of the new contract were supplied to each justice. They were brushed aside because irrelevant.

That effort is now renewed, but how can this court grant certiorari to interpret a contract which does not apply to the *Brady* judgment? And which contract was never seen by the trial judge or Circuit Court of Appeals.

How can petitioner include a contract *de hors* the *Brady* record and ask this court to interpret it with the view to having such interpretation *affect the Brady judgment*?

And finally, how can the petitioner be heard to allege an error which was never committed? Or if committed, had been expressly waived and abandoned?

The petitioner, when defendant in the District Court, raised the question as to who employed the crew under the contract, and the court held that they were servants of the agent. Exception was taken. It also took exceptions to the exclusion of certain evidence. It also attacked the jurisdiction of the common law court to entertain the action claiming that the exclusive remedy was under the Suits in Admiralty Act. The court denies the motions and exceptions were taken.

However, when a plaintiff's verdict was rendered and judgment entered, and the defendant decided to appeal, it became possessed of a great and abiding faith in the soundness of its contention that the law court was without jurisdiction, and, with a show of great confidence, it cast aside and abandoned all the other claimed trial errors *except the denial of its motion to decline jurisdiction.*

That one error was deemed such a sure shot that the defendant elected to rely solely upon it, and in its brief on appeal proclaimed,

“Appellant does not raise any question with respect to the merits.”

How can abandoned errors be recaptured and considered by this court when they were never passed upon by the Circuit Court of Appeals?

The widow Brady is not interested in an adjudication as to “who employs the crew” or “whom to sue” under the 1942 contract. Her rights were founded upon the contract of 1937. She is not interested in preventing a multiplicity of law suits; she wants to collect her judgment.

This petition for certiorari is inexcusable. No basis for it exists. The petitioner risked its success on a single throw of the dice, chancing whether it would show common

law or admiralty jurisdiction. If common law showed, it would lose; if admiralty showed, it would win. The toss was made. "Common law" showed. It had lost the gamble.

Now it wants to renege and have yet another throw, with home made dice, loaded with abandoned errors.

Damages For Delay.

The petitioner has been stubbornly litigious. The decision of this court on the only question raised below should have been considered final. There had been no question left undecided by the court below. Only one question was presented—that of jurisdiction. This court reversed the decision and sent the case back for disposition.

Since all other alleged trial errors had been abandoned there was nothing for the Circuit Court of Appeals to do but affirm the judgment. It could not entertain any alleged trial errors for none were before the court.

The judgment was affirmed.

Not content, the petitioner further delays the payment; again subjects the widow to expense by needlessly and unjustifiably petitioning this court to allow it to raise legal questions alien to the *Brady* record and of interest solely to litigants under a new contract which was not in the *Brady* case.

It is apparent that such lack of merit in the petition must be ascribed to a purpose to accomplish delay only. The petition is "so unsubstantial as to be frivolous". Accordingly we ask the court to penalize such tactics by increasing the damages ten per cent.

Supreme Court Rule 30 (2).

CONCLUSION.

The writ of certiorari should be denied.

Respectfully submitted,

SIMONE N. GAZAN,
Counsel for Respondent.

AUGUST P. KLEIN,
BENJAMIN SIFF,
Of Counsel.

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MAY 25 1943

JAMES LEWIS PROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 1014

ROOSEVELT STEAMSHIP COMPANY, INC.,

Petitioner,

against

MARGARET M. BRADY, as Administratrix of the Estate
of JAMES P. BRADY, deceased,

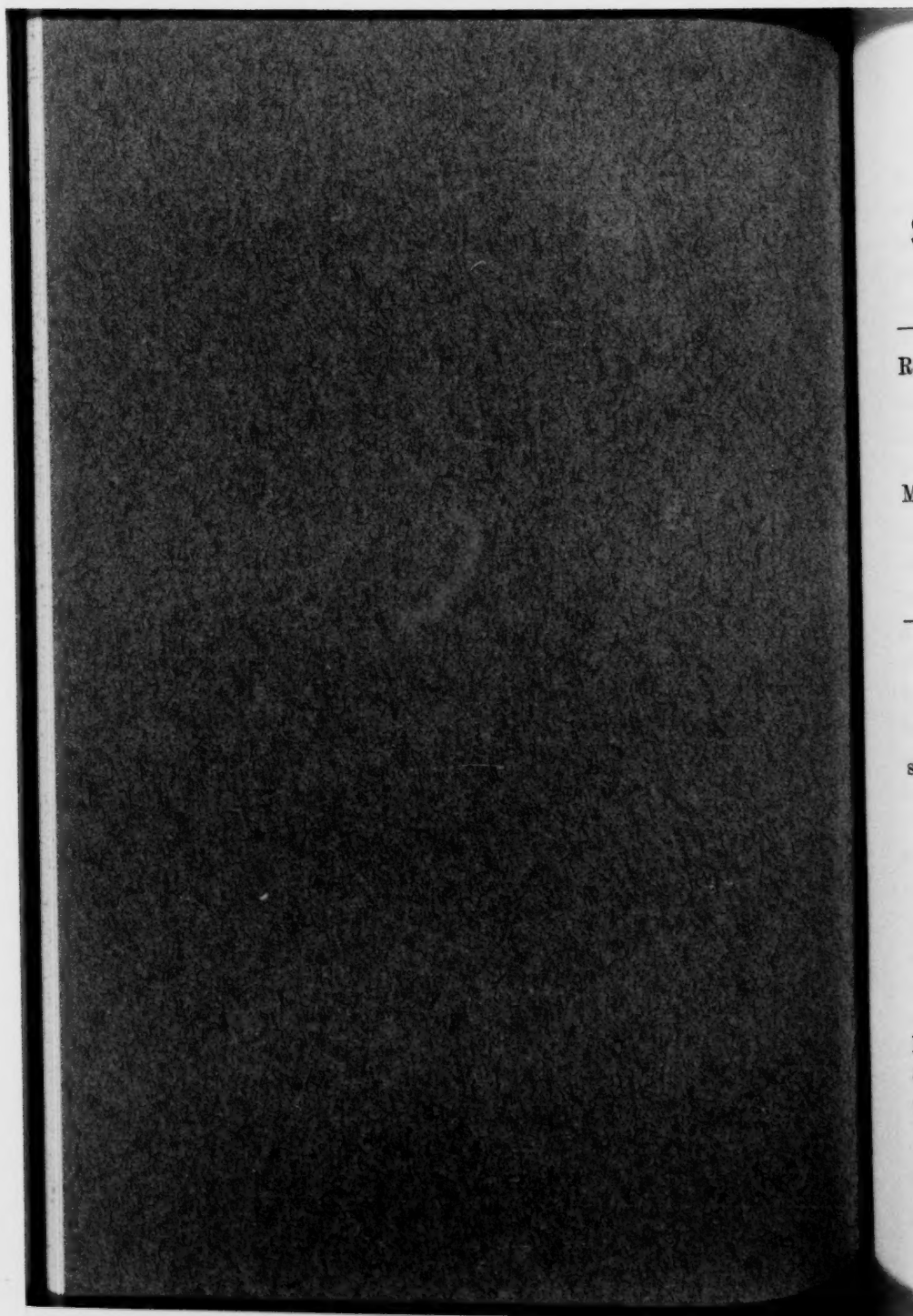
Respondent.

PETITIONER'S MEMORANDUM IN REPLY.

RAYMOND PARKER,

VERNON SIMS JONES,

Attorneys for Petitioner.



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PETITIONER'S MEMORANDUM IN REPLY.

1. On page 5 of respondent's "Memorandum in Opposition to Petition for Certiorari", the following appears:

"Before the mandate of this court was filed in the Circuit Court of Appeals, the Roosevelt Steamship Company petitioned this court for a rehearing, seeking thereby a clarification of the above quoted direction to the Circuit Court of Appeals. This request was refused."

The phrase "above quoted direction" refers to the last paragraph of this court's opinion in *Margaret M. Brady, as administratrix, petitioner, v. Roosevelt Steamship Co., respondent*, No. 269, October term, 1942.

The statement of respondent's counsel is untrue. Petitioner never asked for a "clarification" of this court's opinion in any respect.

The court's attention is respectfully called to the petition for a rehearing which petitioner, then respondent, filed in No. 269. It will be seen that petitioner was not in the least doubtful that this court had remanded the case to the Circuit Court so that the latter could decide whether a cause of action had been proved against the Roosevelt Steamship Company—*i. e.*, whether Roosevelt Steamship Company was, or was not, the employer of the servants whose negligence had caused the death. This court's decision to remand the case to the Circuit Court of Appeals for the decision of this question was clear enough. In the view of Roosevelt Steamship Company, it was altogether too clear.

The petition for re-hearing, which was based on a contention that petitioner had a *right* to have this court decide the question, was denied. That denial meant that Roosevelt Steamship Company did not have a *right then* to have this court decide the question.*

But this court did not decide that Roosevelt Steamship Company would not have a right to petition this court for certiorari after the Circuit Court of Appeals should have dealt with the question pursuant to the remand.

2. On page 5 of respondent's memorandum, the following statement appears:

"The Circuit Court of Appeals agreed that there had been an abandonment of all questions affecting the merits and consequently, since the law (sic) court had jurisdiction, and no other error had been assigned, the judgment must be affirmed.

* Subsequent to the denial of the petition for rehearing, the attorneys who drafted it read the following cases: *Grant v. Leach & Co.*, 280 U. S. 351; *Buzynski v. Luckenbach S.S. Co.*, 277 U. S. 226; *Dismuke v. U. S.*, 297 U. S. 167; *Cole et al. v. Ralph*, 252 U. S. 286, and came to the conclusion that the petition had mistakenly asserted that petitioner had such a right.

“With that announcement made, the attorney for Roosevelt Steamship Company (Mr. Farmer) requested the court to predicate its ruling on its adherence to its *Quinn* decision. The court so agreed for it still considered that the *Quinn* case had been rightly decided.”

This refers to what took place in the Circuit Court following the remand. The statement is utterly and inexcusably false. There is nothing in the record to support it. In fact, it never happened.

The Circuit Court did not say, hold, or announce that “there had been an abandonment of all questions affecting the merits”. The Circuit Court said, after the matter of so-called “abandonment” had been fully argued, that it affirmed the judgment below on the authority of *Quinn v. Southgate Nelson Corp.*, 121 F. (2nd) 190. Moreover, it said this without a request from anyone. The only request which was made of the Circuit Court by counsel for Roosevelt Steamship Company was that the said ruling, already orally announced, be included specifically in its written decision. Accordingly, this was done (R. 129, C. C. R. 163).

The effort of respondent’s counsel to create the impression that petitioner is now asking this court to decide a question which petitioner previously abandoned, is nothing more than an effort to throw dust in the eyes of the court. This appears from the following:

When this case was originally in the Circuit Court of Appeals, petitioner refrained from raising the question which it now asks this court to decide. This was not inadvertent. It was intentional. The reason was apparent. The Circuit Court of Appeals had already decided the same question adversely in the *Quinn* case. Furthermore, this court had denied certiorari in the *Quinn* case five months previously. Therefore, petitioner had no reason at that

time to anticipate that the Circuit Court would reverse itself, or that the Supreme Court would find that the question was publicly significant and so grant certiorari. Although war had intervened after the denial of certiorari in the *Quinn* case the shipping situation was only beginning to have the public significance which it has to-day.

Accordingly, petitioner intentionally relinquished the right which it had to have the *Circuit Court* pass on the point *then*. The only point which petitioner did raise in the Circuit Court was the point with respect to jurisdiction. This is the point which the Supreme Court thereafter decided.

In so relinquishing its right to have the point passed on *then* in the *Circuit Court*, petitioner did not "abandon" the point for all purposes. It was foreseen that, if petitioner should be successful in the Circuit Court of Appeals on the jurisdictional point, and, if the administratrix should thereafter obtain certiorari in this court, Roosevelt Steamship Company would have a right, in accordance with previous decisions of this court, to urge the point with respect to the employment of the members of the crew as an additional ground for sustaining the judgment of the Circuit Court. For such purpose, the point was not waived by not arguing it in the Circuit Court of Appeals.

Although the Supreme Court did not decide this question *at that time*, it did remand the case to the Circuit Court, thus permitting the question to be decided there. This was equivalent to a holding that the question had *not* been "abandoned" for all purposes and, therefore, was still available to the petitioner in the Circuit Court. In this way, the Supreme Court disposed of respondent's contention, made in a brief and on argument, that the question had been abandoned and was not available. Petitioner's Reply Brief in No. 269, p. 1.

Moreover, the Circuit Court, when it affirmed thereafter the decision of the District Court, solely on the basis of the *Quinn* case, ruled, in effect, that the point was still available to the petitioner. If it had thought that the point was not then available, by reason of the appellant's not urging it on the first hearing of the appeal, it could not have affirmed the judgment on the authority of its previous decision in the *Quinn* case. The merits of the judgment would not have been before the court for decision.

Now that the Circuit Court has decided, consequent to this court's remand, that the point was available to the petitioner, but has decided the point adversely to petitioner's contention, petitioner is entitled to ask that the Supreme Court grant certiorari to review the Circuit Court's decision, provided that the question is one of sufficient public interest.

In so doing, petitioner has assumed that the private interests of the litigants in this case are no more relevant to the merits of the petition than they were in the *Quinn* case, and that, if the question, as now raised in this case, has sufficient public significance to warrant the granting of certiorari, it is because we are now in a war in which ships, and injuries caused by them, and by those who work on them, are a matter of great and increasing public concern, and especially to those members of the public who are confused by contrary decisions, and must now choose uncertainly between them.

Respondent agrees that it is "desirable" that there be a final decision as to whose servants the crews of Government vessels really are, but asks, in effect, that the public interest in such a decision be deferred so that the "widow Brady" may first cash her judgment, however ill founded it may be. Respondent's Memorandum in Opposition to the Petition for Certiorari, pp. 12, 13.

Furthermore, respondent's counsel does not deny petitioner's claim that this important question is directly involved in the present case. He says merely that the form of contract now in use is not the same as the one in this case. Respondent's Memorandum, p. 12. That is true, as petitioner has been at pains to make clear, but it does not follow that the new form of contract and the relations existing between the United States and its agents and the public are not affected by the decision already made herein. The fact is that all contracts now made, or to be made in the future, between the United States and its agents for the operation of ships, wherein the parties intend that the crew shall *not* be servants of the agent, are definitely questionable and ineffective by reason of the decisions in the Quinn and the Brady cases. This condition is bound to continue, and the confusion is bound to increase until the Supreme Court shall have decided the question. It can be decided now on the basis of the present form of contract, as well as in the future on the basis of some other form of contract which may be devised by the parties in the future. The substance will be the same whatever formal changes are made.

The question then is whether the decision should come now or later.

3. On page 8 of respondent's memorandum, the following appears:

"The defendant had the possession and control of the vessel and all her tools and appliances;"

There is nothing in the record to justify this statement, and nothing is cited. In point of fact, unless it be *assumed* that Roosevelt Steamship Company employed the members of the crew, who had actual possession and control of the

vessel, the statement is untrue. But such an assumption begs the question, for the question of who employed the crew is the very question which petitioner is asking this court to hear and decide.

4. On page 10 of respondent's memorandum the following appears:

"The decision of the Circuit Court of Appeals (in *adhering to its prior decision in the Quinn case*) is said to be in conflict with a state court decision in California and an early decision of the Circuit Court of Appeals, Second Circuit.

"The California decision involved the old M.O. 3 form under the Fleet Corporation set up, and this court decided to the contrary in the Sloan's Shipyard case, 258 U. S. 549.

"So that 'precedent' is out."

This is so obviously misleading as to evoke wonder. The case of *Sloan Shipyards Corporation et al. v. United States Shipping Board Emergency Fleet Corp. and the United States*, 258 U. S. 549, was decided in 1922. The case of *City of Los Angeles v. Los Angeles Pacific Navigation Company et al.*, 1927 A. M. C. 1781, 84 Cal. App. 413, was decided in 1927. Thus, the *Sloan* case did not, as one might gather from respondent's memorandum, overrule the *California* case. The decision in the *California* case was reached without reference to the *Sloan* case, and, notwithstanding it, because it dealt with a different question entirely.

The *Sloan* case had nothing to do with the M.O. 3 form of agency agreement, or with the construction and interpretation of any agency agreement between the United States and private agents for the operation of vessels. It merely held that agents for the United States, and even corporate

agents whose stock was entirely owned by the United States, were or could be liable for their torts. But it did not say, nor attempt to say, whether a tort, committed by a member of a crew of a United States owned and *operated* vessel, was the agent's tort or the tort of the United States—*i e.*, whether such member of the crew was a servant of the agent or of the United States.

That question has never been decided by the Supreme Court.

Respectfully submitted,

RAYMOND PARMER,
VERNON SIMS JONES,
Attorneys for Petitioner.

